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No. 80-1012

In the
Supreme Court of the United States
October Term, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, a California corporation, etc., et al.,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of California Third Appellate District.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Morton Siegel, Esq.
Siegel, Denberg, Vanasco, Shukovsky, Moses & Schoenstadt, Ltd.
189 West Madison Street, Suite 1000
Chicago, Illinois 60602
Telephone: (312) 263-6423
Attorneys for Amicus Curiae.

The Scheffer Press, Inc.—(312) 263-6850

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Now come the Chairmen, Directors, Commissioners, Chiefs and Superintendents of the following state liquor commissions:

Lloyd H. Robertson, Superintendent *Arizona* Department of Liquor Licenses and Control

James D. Sims, Chairman *Indiana* Alcoholic Beverage Commission

Phillip H. Weaver, Commissioner *Nebraska* Liquor Control Commission

Edward J. McLaughlin, Chairman Hugh B. Marius, Commissioner Dorothea M. Klajbor, Commissioner Robert E. Doyle, Commissioner Terrence R. Flynn, Commissioner *New York* State Liquor Authority

Robert E. Hanson, State Treasurer *North Dakota* State Treasurer's Office

Marvin D. Eller, Chief *Colorado* Department of Revenue Liquor Enforcement Division

Richard H. Lewis, Commissioner *Kentucky* Department of Alcoholic Beverage Control

James R. Baca, Director *New Mexico,* Alcoholic Beverage Control Board

Marvin L. Speight, Jr., Chairman *North Carolina* Board of Alcoholic Beverage Control,

a "control state"

Miller S. Ingram, Chairman *South Carolina* Alcoholic Beverage Control Commission

and hereby respectfully move for leave to file the attached brief amicus curiae in this case. The consent of the attorneys for the Petitioners has been obtained. However, the consent of the attorney for Respondents was requested but refused.

The amicus parties in this brief represent a "control state", wherein the state completely controls and operates the distribution and sale of liquor, and "open states", which permit private enterprise to operate the liquor business within the state, both of which are concerned with the confusion and danger that has resulted from the lower Court dicision.

The primary interest of the amicus parties is founded upon the power and authority delegated to the states under Section 2 of the Twenty-First Amendment of the Constitution of the United States, which authority is unclear and in jeopardy due to the decision of the lower court. The interest of the state liquor authorities is far broader than the specific "designation statute" reviewed by the lower Court.

The lower Court has established an anti-trust pre-emption test as a basis for challenging all enactments of a state under Section 2 of the Twenty-First Amendment. The broad theory of the Sherman Act — that trade should be free of artificial restraint — is in many respects incompatible with the policy of state liquor control legislation.

In applying the anti-trust pre-emption test, the lower Court relied upon *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which is the most important decision applicable to the beverage alcohol industry over the past twenty years. Originally, *Midcal* was decided by the same California Court of Appeals which decided *Williams*, wherein the Court of Appeals relied entirely on the reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d, 431 (1978).

Therefore, there now exists a series of California decisions, the impact of which is already evident in cases now pending in other jurisdictions throughout the country. See *H. & H. Distributing Company* v. *Mississippi Tax Commission, et al.*, in the U. S. District Court, Southern District of Mississippi, Jackson Division; Case No. J 8-0323(N); *Mile-Hi Wholesale Liquors, Inc.* v.

Alan Charnes, Executive Director of the Department of Revenue of the State of Colorado, in the District Court, in and for the City and County of Denver, State of Colorado; *Walgreen Company, et al.* v. *Illinois Liquor Control Commission, et al.*, in the Circuit Court of the Twelfth Judicial Circuit, Kankakee County, Illinois, No. 8-MR-76; *M. H. Gordon and Sons, Inc.* v. *Alcoholic Beverage Control Commission, Commonwealth of Massachusetts*, Superior Court, Case No. 79-704. Thus, the lower Court decision, which has emanated from an "open state", has caused a series of challenges to the Twenty-First Amendment in both "open" and "control" states,[1] throughout the United States. Based upon these challenges, there is a need for an orderly judicial administration of pending and related litigation.

In its brief the amicus parties will demonstrate that the lower Court holding is in direct conflict with this Court's decision in *"Midcal"*, its earlier decisions related to the Twenty-First Amendment, and a recent Kansas Supreme Court decision in *Colby Distributing Co., Inc.* v. *Lennen*, 227 Kan. 179, 606 P. 2nd 102 (1980), which was summarily dismissed by this Court in *Grant-Billingsley Liquor Co., Inc.* v. *Michael C. Lennen*, 49 U.S. Lw. 3331 (Appeal dismissed for want of a substantial federal question).

The legislature is the policy maker of the State. Their discretion is broad and may not be overturned because a court may deem them unwise. The lower Court has in effect created a role whereby it will be the function of a court to speculate as to the propriety of state policy.

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[1] *Fisher Foods, Inc.* v. *The Ohio Department of Liquor Control*, U. S. District Court, Third District of Ohio, C80-2381, filed December 29, 1980.

This prospect would endanger a network of regulations that combine and work together; it will decontrol a structure which is designed to protect the yield of millions of dollars in state revenue; it will cause confusion as to whether federal or state government is responsible for enforcement activities; it will destabilize 45 years of effective pervasive regulation and cause chaos in the meantime. In the instance of alcoholic beverages, the results are not responsive to protection of the health, safety and welfare of the public.

The constitutional arguments made in the amicus curiae brief are central to the disposition of this matter and it is believed that the brief which amicus curiae are requesting permission to file will contain a more complete argument on the constitutional issues raised. If this argument is accepted, it would be dispositive of this case.

Respectfully submitted,

Morton Siegel, Esq.
Siegel, Denberg, Vanasco, Shukovsky,
Moses & Schoenstadt, Ltd.
Attorneys for Amicus Curiae.

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAIRMEN, DIRECTORS, COMMISSIONERS, CHIEFS AND SUPERINTENDENTS OF THE STATE LIQUOR COMMISSIONS OF:

ARIZONA
COLORADO
INDIANA
KENTUCKY
NEBRASKA
NEW MEXICO
NEW YORK
NORTH CAROLINA
NORTH DAKOTA
SOUTH CAROLINA

The amicus parties are in support of the Petition for Writ of Certiorari, filed in this cause.

QUESTIONS PRESENTED

Whether or not the lower Court has substituted its judgment for that of the legislature, by rejecting a state policy on the basis of an anti-trust pre-emption test, which has placed in jeopardy the ability of the state to protect the health, safety and welfare of its citizens, as it relates to regulation of the alcoholic beverage industry pertaining to the following:

(a) the importation and transportation of alcoholic liquors within a state; and

(b) the structuring of the liquor distribution system within a state; and

(c) the delivery, sale, use or consumption of alcoholic liquors within a state; and

(d) the revenue of the State.

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAIRMEN, DIRECTORS, COMMISSIONERS, CHIEFS AND SUPERINTENDENTS OF THE STATE LIQUOR COMMISSIONS OF: ARIZONA, COLORADO, INDIANA, KENTUCKY, NEBRASKA, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA AND SOUTH CAROLINA, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Court of Appeal, Third Appellate District, is officially reported as *Norman Williams Co., et al.* v. *Rice,* 166 Cal. Rptr. 563 (1980); ptn. for hrg. den. Sept. 24, 1980.

JURISDICTION

The opinion of the Court of Appeal was entered on July 16, 1980. The California Supreme Court denied a timely Petition for Hearing on September 24, 1980. The Petition for Writ of Certiorari was filed on the 22nd day of December, 1980. The jurisdiction in this Court rests on 28 U.S.C. 1257(3).

INTEREST OF THE STATE

Pursuant to the Twenty-First Amendment of the United States Constitution, the State has the duty to administer, regulate and tax the alcoholic beverage industry in order to protect and promote the health, safety and welfare of the people of the State. In accordance with its duties, it is called upon to administer and enforce the statutes and regulations adopted under the Twenty-First Amendment as it pertains to the taxation, importation, transportation, distribution, delivery, sale, use and consumption of alcoholic liquors.

The amicus parties in this brief represent a "control state", wherein the state completely controls the distribution and sale of liquor, and "open states", which permit private enterprise to operate the liquor business within the state, both of which are concerned with the confusion and danger that has resulted from the case below. The lower Court decision, which has emanated from an "open state", has caused a series of challenges

to the Twenty-First Amendment in both "open" and "control" states, throughout the United States. Based upon these challenges, there is a need for an orderly judicial administration of pending and related litigation.

The State, accordingly, has a vital interest in seeking review of the lower Court's decision, which, if left undisturbed, would jeopardize the State's revenue and disrupt a pervasive system of regulation which has served the public for over 45 years.

STATEMENT OF THE CASE

Among the petitioners before the lower Court are licensed importers and wholesalers of the State of California, who desire to secure national brands of distilled spirits from Oklahoma wholesalers. In this proceeding, the lower Court invalidated that portion of the California Business and Professions Code, Sections 23672 (as amended by Assem. Bill No. 499, Stats. 1979, Ch. 280, Sec. 1; hereinafter "designation statute"), which provides that a licensed importer shall not purchase or accept delivery of any brand of distilled spirits, unless designated as an authorized importer of such brand by the brand owner or its authorized representative.

The respondent, Baxter Rice, Director, Department of Alcoholic Beverage Control, believes the State interest will be best served by requiring a licensed California importer to be designated as an authorized importer of such brand by the brand owner or its authorized agent.

To the extent that the petitioners were not designated as authorized importers of such brand, they elected to challenge the Statute.

The lower Court, in reliance upon this Court's decision, in *California Retail Liquor Dealers Assn* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), invalidated the "designation" portion of the Statute on the basis of a Sherman anti-trust pre-emption test, by finding that the federal policeis of the Sherman Act outweigh the State interests related to the Statute.

SUMMARY OF ARGUMENT AND REASONS FOR GRANTING THE WRIT

The decision below raises issues of grave concern. The State's interest as an amicus party in this proceeding is far broader than the specific "designation statute" reviewed by the lower Court. Based on this Court's recent decision in *California Retail Liquor Dealers Assn* v. *Midcal Aluminum, Inc., supra* ("Midcal"), the lower Court has established an anti-trust pre-emption test as a basis for challenging enactments under Section 2 of the Twenty-First Amendment. Considering the universal application of *Midcal* since March, 1980, which was decided by the same lower Court, it is probable that the "*Norman Williams*" anti-trust pre-emption test will be the forerunner for all future challenges to enactments under Section 2 of the Twenty-First Amendment.

In this brief, we show that the lower Court holding is in direct conflict with this Court's' decision in ***"Midcal"***, its earlier decisions related to the Twenty-First Amendment, and a recent Kansas Supreme Court decision in *Colby Distributing Co.* v. *Lennen,* 227 Kan. 179, 606 P. 2nd, 102 (1980), which on appeal was summarily dismissed by this Court in *Grant-Billingsley Liquor Co., Inc.* v. *Michael C. Lennen,* 49 U.S. Lw. 3331 for want of a substantial federal question (November 3, 1980). If the lower Court's decision is left undisturbed, it would have an unsettling effect on numerous other state statutes and regulations, thereby seriously jeopardizing the state's revenue and power to regulate the alcoholic beverage industry. Anti-trust laws control the conduct of private parties. They are an inappropriate means for testing enactments under the Twenty-First Amendment, which regulate an industry.

ARGUMENT

I. HISTORICAL BACKGROUND OF THE TWENTY-FIRST AMENDMENT

Tempered by the experience of pre-prohibition, as well as the prohibition era (prior to 1933), both Congress and the Courts have memorialized that alcoholic beverage products and the alcoholic beverage industry are distinctively different than other products and industries which are a part of the American economic system. Persons engaged in the alcoholic beverage industry are not private entrepreneurs such as exit in other industries. The inherent dangers related to alcoholic beverages and the unique nature of the liquor industry have justified a regulatory system dissimilar to the other industries, i.e., state operated liquor stores; limitations on retail purchases across state lines; restrictions on product line; restrictions on credit to consumers; restrictions on: advertising, labeling, packaging, bottle sizes, production etc. This industry is engaged in a quasi-partnership with the State and annually produces millions of dollars of State revenue. Enforcement is monitored by hundreds of state inspectors.

It is the only industry which was legalized by Constitutional Amendment, and represents the only express grant of power to the states, thereby creating a fundamental restructuring of the Constitutional scheme as it relates to one product . . . intoxicating liquors. *California* v. *LaRue*, 409 U.S. 109 (1972).

The comprehensive regulatory scheme, which has been adopted under the Twenty-First Amendment by each

state, is designed to protect its revenue as well as control the production and movement of product and persons engaging in business. The control needed to accomplish these goals is a network of regulations which work together.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT UNDER SECTION 2 OF THE TWENTY-FIRST AMENDMENT

A. "MIDCAL"

The issue presented for review is whether or not the constitutionality of statutes adopted under Section 2 of the Twenty-First Amendment should be perpetually tested on the basis of the general purpose of the anti-trust laws. In reliance upon this Court's decision in *Midcal, supra,* the lower Court invalidated a portion of a California Statute which permitted brand owners to designate distributors of its brands, by finding that such grant of authority was in direct contravention of the express purpose of the Commerce Clause and the Sherman Act. The statute involved amends the California Business and Professions Code, Section 23672, and provides in part as follows:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. . . ." ("Designation Statute")

Thus, the Statute under attack in this proceeding, pertains to the power of a state to regulate the importation of liquor and how to structure the distribution system. The lower Court decision is in direct conflict with *Midcal,* which specifically reaffirmed a state's power under the Twenty-First Amendment to regulate the im-

portation and distribution of liquor within its borders, wherein the Court stated on page 946:

> "The Twenty-First Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."

and on page 944:

> "This Court's early decisions on the Twenty-First Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions."

In *Midcal*, this Court invalidated California's wine pricing system on the basis it violated the Sherman Anti-Trust Act. *Midcal* is a price case, and price competition has always been a matter of long-standing active concern to the federal government. A discussion of *Midcal*, its extension or application, should be viewed on the basis that price-fixing is the most firmly established and most "per se" of the "per se" violations.

Therefore, at most, *Midcal* is a limited exception to this Court's earlier decisions related to the Twenty-First Amendment and the federal commerce powers. Yet, even in pricing cases, the Supreme Court has sustained the Twenty-First Amendment against anti-trust challenges. In *Joseph E. Seagram & Sons, Inc.* v. *Donald S. Hostetter*, 384 U.S. 60 (1966), a New York Statute which required that monthly price schedules filed by brand owners with the State Liquor Authority must be accompanied by an affirmation as to price, was unsuccessfully attacked under the Sherman Act.

It was not the intention of this Court to establish a perpetual Sherman Act test for purposes of challenging

enactments under Section 2 of the Twenty-First Amendment, wherein this Court stated in *Midcal* on page 946:

> "Although states retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power *in appropriate situations.*" (emphasis added)

Application of the federal commerce power to invalidate California's "Designation Statute" is not an *appropriate situation.* A review of Supreme Court decisions prior to *Midcal* is dispositive of how the federal commerce powers have affected the Twenty-First Amendment.

B. COMMERCE CLAUSE VERSUS TWENTY-FIRST AMENDMENT

The lower Court's holding is in direct conflict with Supreme Court decisions pertaining to the federal commerce power and the Twenty-First Amendment.

Supreme Court decisions since adoption of the Twenty-First Amendment have confirmed that the amendment primarily created an exception to the normal operation of the Commerce Clause. *State Board of Equalization of California* v. *Young's Market Company,* 299 U.S. 59 (1936); *Finch & Co.* v. *McKittrick,* 305 U.S. 395 (1939); *Carter* v. *Virginia,* 321 U.S. 131 139-140 (1944); *Hostetter* v. *Idlewild Liquor Corp.,* 377, U.S. 324 (1964); *Craig* v. *Boren,* 429 U.S. 190, 205, 97 S. Ct. 451, 461, 50 L. Ed. 397 (1976); *U.S.* v. *Frankfort Distilleries,* 324 U.S. 293, 299, 300 (1945).

The State's power under Section 2 of the Twenty-First Amendment compels restrictive economic regulations which restrain trade and have prevailed over Commerce Clause tests in several instances wherein the challenged statute regulated the importation of intoxicating liquors.

In *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938) the Court upheld a law restricting the types of liquor that could be imported from other states. In *Finch & Co.* v. *McKittrick, supra; Indianapolis Brewing Co.* v. *Liquor Control Commissioners,* 305 U.S. 391 (1939), this Court upheld a state's right to legislate in retaliation for another state's enactments which affect commerce within the state's borders, barring imports from states that proscribe shipments of liquor from other states; in *State Board* v. *Young's Market, supra,* the Court upheld a State's right to exact a license fee for the privilege of importing beer from other states; and, further, in *Ziffrin, Inc.* v. *Reeves, Commissioner of Revenue of Kentucky, et al.,* 308 U.S. 132 (1939) the court upheld a statute which restricted the transportation of alcoholic liquors, to certain prescribed carriers while within its borders and destined for interstate commerce, *in order to protect the state's revenue.* In each of these cases, the Supreme Court opted in favor of the *State's interest* and upheld the right of a state to regulate the importation of intoxicating liquor unconfined by the commerce clause or Sherman Act. *Midcal* re-affirmed each of the above decisions. See also *Heublein, Inc.* v. *South Carolina Tax Commission,* 409 U.S. 275 (1972).

The lower Court has disregarded the principles established under the federal commerce power cases and was persuaded more by the conventional purpore of the Sherman Act, as it pertains to the conduct of private parties, rather than its application to the Twenty-First Amendment, wherein the Court stated at page 570:

> "Art. 1. Section 8(3) of the United States Constitution gives to the federal government the exclusive power to regulate interstate commerce."

Also at page 571.:

> "In the balancing process we are required to determine what policies are furthered by the State Statute, whether and to what degree the policy underlying the Sherman Act is undermined by that Statute."

It is clear by the emphasis placed on the Sherman Act by the Court below that it believes in federal supremacy rather than state primacy over the regulation of alcoholic beverages. This principle has been long-established in favor of the states. *U.S.* v. *Frankfort Distilleries, supra,* page 300.

The flaw in the lower Court's reasoning is its failure to acknowledge that the Twenty-First Amendment created an exception to the normal operation of the Commerce Clause, and that the states were free from the implied restrictions of the Commerce Clause. The Sherman Act was adopted pursuant to the Commerce Clause and is not afforded more meaning than the clause itself. Anti-trust laws are designed to eliminate private party abuses and combinations while the Twenty-First Amendment attempts to prevent abuses in the liquor traffic.

Thus, having failed to distinguish between the Commerce Clause and the Twenty-First Amendment, as compared to the Commerce Clause and private party conduct, any subsequent attempt by the lower Court to apply the "so-called" balancing test referred to in *Midcal* was meaningless.

It is not the position of the amicus that private parties engaged in the liquor business are immune from the anti-trust laws. Rather, under the "Designation Statute" the brand owner exercises an independent judgment as to selection of one or more importers for its brands.

It is conceivable that private parties may engage in conduct beyond the scope of the Designation Statute, which could lead to a violation of the anti-trust laws. That issue is not before the Court at this time. *Seagram* v. *Hostetter, supra,* pages 1259-1260.

Perhaps the clearest expression of reservations under the Twenty-First Amendment is set forth in the recent decision of the 5th Circuit, U. S. Court of Appeals in *Castlewood International Corp.* v. *Simon,* 596 Fed. Rptr. 2d 638, cert granted, judgment vacated, remand by the U. S. Supreme Court for further consideration in light of *Midcal* on May 19, 1980, opinion reinstated by 5th Circuit U. S. Court of Appeals, October 1, 1980, wherein the Court stated on page 643:

> "Federal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: 1) where the state regulation was repugnant to overriding national concern with due process and equal protection, and 2) where the state has sought to invade an area of exclusive federal concern, such as federally owned installations, regulation of commerce with foreign nations, and taxation of imports from foreign countries."

Therefore, the anti-trust laws are not an appropriate challenge to the constitutionality of the "Designation Statute" and any argument as to their applicability is premature.

C. DESIGNATION STATUTES DO NOT PRESENT A FEDERAL QUESTION

The lower Court decision is in conflict with the decision of the Kansas Supreme Court in *Colby Distributing Co.* v. *Lennen, supra,* wherein the Court rejected a Sherman Act challenge to a Kansas Statute enacted under the Twenty-First Amendment, which is similar to the

California Statute. Both the Kansas and California Statutes authorize brand owners to designate distributors. However, the Kansas Statute is more restrictive in that it provides for exclusive distributors territorial allocations for distribution and proof of good cause for purposes of terminating a distributor.

The Sherman Act challenge in *Colby* was pursued on appeal before this Court whereby an order of summary dismissal was entered for want of a substantial federal question on November 3, 1980. See *Grant-Billingsley Wholesale Liquor Co., Inc.* v. *Lennen, supra.* Dismissals for want of a substantial federal question are decisions on the merits and have precedential value. *Hicks* v. *Miranda,* 422 U.S. 322 (1975). The lower Court decision is in conflict with this Court's order of dismissal in *Grant-Billingsley.*

III. THE DECISION BELOW WILL HAVE AN UNSETTLING EFFECT ON NUMEROUS STATE STATUTES AND REGULATIONS, AND WILL JEOPARDIZE THE STATES' FURTHER ABILITY TO CONTROL THE IMPORTATION, DISTRIBUTION, SALE, CONSUMPTION AND TAXATION OF ALCOHOLIC BEVERAGES

The lower Court decision is contrary to this Court's holding in *Midcal* and its earlier decisions under the federal commerce power. It is the position of the amicus that the finding of the lower Court transcends the "Designation Statute" and jeopardizes the comprehensive regulatory system governing the alcoholic beverage industry during the past 45 years. The lower Court relied upon *Midcal,* which is the most important decision applicable to the beverage alcohol industry over the past 20 years. Originally, *Midcal* was decided by the same California Court of Appeal which decided *Williams,*

wherein the Court of Appeal relied entirely upon the reasoning in *Rice* v. *Alcoholic Beverage Appeals Board*, 21 Cal. 3d 431 (1978).[1]

We, therefore, have a series of California decisions, one which led to *Midcal*, and in the instant matter, one which is interpreting *Midcal*. The impact of the California decisions is already evident in cases now pending in other jurisdictions throughout the country.[2] So, too, the lower Court decision will have perpetual and universal application to present and future challenges under the Twenty-First Amendment.

The lower Court failed to qualify the express purpose of the anti-trust laws (free and unfettered competition) by decisions of this Court, which have held that the Twenty-First Amendment primarily created an exception to the normal operation of the commerce clause.

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[1] Also, in *Capiscean Corp.* v. *Alcoholic Beverage Controls Board*, 87 Cal. App. 3d, 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[2] *H. & H. Distributing Co.* v. *Mississippi Tax Commission, et al.* in the U.S. District Court, Southern District of Mississippi, Jackson Division; Case No. J 80-0323 (N); *Mile-Hi Wholesale Liquors, Inc.* v. *Alan Charnes, Executive Director of the Department of Revenue of the State of Colorado*, in and for the City and County of Denver, State of Colorado; *Walgreen Company, et al.* v. *Illinois Liquor Control Commission, et al.*' in the Circuit Court of the Twelfth Judicial Circuit, Kankakee County, Illinois, No. 8-MR-76; *M.H. Gordon and Son, Inc.* v. *Alcoholic Beverage Control Commission, Commonwealth of Massachusetts*, Superior Court, Case No. 79-704. *Fisher Foods, Inc.* v. *The Ohio Department of Liquor Control*, U.S. Dist. Ct., Third District of Ohio, C80-2381, filed 12-29-80.

Thus, it is the finding of the lower Court which seriously jeopardizes a pervasive system of regulation that has evolved over the years, wherein the lower Court stated:

> "We find that the *substantial federal policies of the Sherman Act* are violated by the Liquor Designation Statute and, in light of the clear alternatives to that Statute, the state interests sought to be achieved are not sufficient to outweigh these policies." (emphasis added)

It is obvious from the Court's finding, that by not recognizing the declared restraints to the normal operation of the commerce clause, it was precluded from making a meaningful evaluation of the State's interest. The Sherman Act was enacted under the authority of the Commerce Clause and is necessarily of no greater dignity than that clause. The evils at which it is aimed differ from the abuses attempted to be corrected by the state law here in question. The one seeks to stamp out private monopoly and to interdict combinations in restraint of trade, the others to correct abuses inherent in the liquor traffic. Thus, the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor control legislation, for invocation of that Act tends to hamper or interfere with the enforcement of state laws, regulatory of the transportation or importation of intoxicants, and wherever such confict exists, the Sherman Act must give way, just as the Commerce Clause itself gives way in identical circumstances. See *Washington Brewers Institute* v. *United States*, 137 Fed. Rptr. 2d 964, p. 967 and 968, 9th Circ., Court of Appeals (1943); *U. S.* v. *Frankfort Distilleries, supra,* P. 299, 300.

As the amicus has pointed out in this brief, the state's power under Section 2 of the Twenty-First Amendment is intended to restrict trade and commerce as it relates to one product, intoxicating liquors.

> "Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme." *Castlewood International Corp.* v. *William Simon, supra.* P. 642.

Further, the state policy related to the "Designation Statute" is a valid interest. Pursuant to both the federal and California regulations, restrictions are imposed on brand owners as to: importing, advertising, packaging, labeling, bottle sizes, exchange and return of product. Revenue is produced by way of license fees, occupation taxes and excise taxes. In the area of importation and taxation, brand owners are required to obtain licenses, file reports, and comply with standards of production, all of which are intended to protect the State's revenue, as well as the health and welfare of its citizens. It is in the State's interest that persons authorized by a brand owner are importing brands into the State as opposed to a system, which encourages importation of alcoholic beverages *from any source* outside the state. There is nothing unique about the designation system, as it has existed throughout the alcoholic beverage industry, as well as other industries.

The "designation statute" is one component of a series of regulations which together permit the importation of

liquor and structuring of the distribution system. *Supervision* under the designation statute, as well as other statutes, is implemented by a broad grant of regulatory authority to the Department and Board, Article XX, Section 22 of the California Constitution, Section 25750 of the Business and Professions Code of California.

Therefore, taking into account the enormous responsibility which has been delegated to the States under the Twenty-First Amendment, it is not the function of a court to speculate as to the propriety of state policy. The legislature is the policy-maker of the State. Their discretion is broad and may not be overturned because a court may deem them unwise.

In *Joseph A. Seagram & Sons, Inc.* v. *Donald S. Hostetter, supra,* this Court stated on page 1262.:

> "We have returned to the original constitutional proposition that courts do not substitute their social *ecenomic beliefs* for the judgment of legislative bodies who are elected to pass laws." (emphasis added)

and in *U. S.* v. *Franfort Distilleries, supra,* Justice Frankfurter, in his concurring opinion, stated on page 300.:

> "The course of legal history which made necessary the Twenty-First Amendment in order to permit the States to control the liquor traffic, *according to their notions of policy* freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce, was summarized in my concurring opinion in *Carter* v. *Virginia,* 321 U.S. 131, 139." (emphasis added)

It is the province of the legislature guided by the experience of a state agency, which can best determine the tools needed to regulate an industry. The lower Court

was in no position to judge the precise manner in which the "Designation Statute" would fit into the State's network of regulations, nor could it determine that the Statute will result in a restraint subject to the Sherman Act. Application of the Sherman Act was premature and inappropriate in this proceeding.

CONCLUSION

The pre-emption test adopted by the Court has been structured as a standard by which to test the validity of all enactments under Section 2 of the Twenty-First Amendment. Under the terms of the amendment, the control is restrictive. Thus, regulations under Section 2 will not pass muster if subjected to a conventional anti-trust test, as applies to ordinary articles of commerce.

This prospect would endanger a network of regulations that combine and work together; it will de-control a structure which is designed to protect the yield of millions of dollars in state revenue; it will cause confusion as to whether federal or state government is responsible for enforcement activities; it will de-stabilize 45 years of effective pervasive regulation and cause chaos in the meantime. In the instance of alcoholic beverages, that is not responsive to protection to the health, safety and welfare of the public.

In reliance on this Court's pre-*Midcal* decisions over the past four decades, the States have conscientiously exercised its best judgment in controlling the traffic in alcoholic beverages. *Midcal*, at best, is a singular exception as it applies to direct pricing arrangements. The lower Court decision is a gross distortion of a limited

exception. Alternatively, the lower Court has misinterpreted the application of *Midcal*, which confusion is now *national* in scope as evidenced by the cross-section of states that have joined in as amicus parties in this proceeding.

It is, therefore, essential that this Court end the confusion, grant this writ, and determine whether or not the anti-trust laws may be used perpetually as a basis to test the validity of all enactments under the Twenty-First Amendment.

For all of the foregoing reasons, this Court should grant certiorari, and reverse the judgment of the lower Court.

Respectfully submitted,

MORTON SIEGEL, ESQ.
SIEGEL, DENBERG, VANASCO, SHUKOVSKY, MOSES & SCHOENSTADT, LTD.
189 West Madison Street, Suite 1000
Chicago, Illinois 60602
Telephone: (312) 263-6423
Attorneys for Amicus Curiae.